Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 1993 TERM

FREDDIE J. WILLIAMS, M.D.,

PETITIONER

V.

UNITED STATES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CETIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE TRIAL COURT ERRED IN GIVING A TOTALLY FALSE AND MISLEADING JURY INSTRUCTION AS REQUESTED BY THE RESPONDENT.

II

WHETHER THE EXCLUSION AND/OR NON-EXISTENCE OF ANY BLACK JURY VENIRE MEMBERS FORM A CRIMINAL CASE INVOLVING A BLACK DEFENDANT IS DEEMED UNCONSTITUTIONAL.

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TO THE SUPREME COURT OF THE UNITED STATES

COMES NOW your Petitioner, FREDDIE J. WILLIAMS, M.D., and petitions this Honorable Court for a Writ of Certiorari to issue in the above-styled cause under Rule 14, Rules of the Federal Appellate Rules of the United States, and shows the following:

SUMMARY PROCEEDINGS BELOW

1. On May 25, 1993 the Court of Appeals for the Eleventh Circuit affirmed the decision of the Trial Court without an opinion, case # 91-4144, attached as Appendix # A and denied an application for Suggestion for En Banc Hearing on December 3, 1993.

2. Your Petitioner maintains that the Trial Court erred and the decision of the Eleventh Circuit Court of Appeals is in conflict with prior decisions of the Circuit Courts of Appeal and the Supreme Court of the United States decisions in prior cases of similar standing.

STATEMENT OF JURISDICITON

On May 25, 1993 the Eleventh Circuit Court of Appeals affirmed the decision of the Trial Court, and overruled the application for En Banc Rehearing on December 3, 1993.

This Petition for Writ of Certiorari is pursuant to the Due Process Clause of the Fifth Amendment to the Constitution of the United States, which reads as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law, nor shall private property be taken for public use, without just compensation, and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, which reads as follows:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS MATERIAL TO THE ISSUES

Freddie J. Williams, M.D. was charged in a 70 count indictment which alleged mail fraud through the submission of false statements and claims relating to his billing medicare in his medical practice.

At issue is whether the claims filed were fraudulent representations of the services performed. Specifically, whether the law required the physician to be physically present in the building when the services were rendered for the physician to bill for the services rendered by a staff professional.

At trial, and only minutes before the Courts Jury Charge, the Respondent provided the Court with "Statutory Authority" for a jury instruction on the issue of the physician's presence in the building. That Authority was later found to be inapplicable in the instant case as it was not in effect at the time of the alleged unlawful conduct.

Facts pertaining to the jury make-up are

that the pool of jurors from which the Petitioner, who is a black male, was to strike was totally absent any members of his race. The entire pool, prior to division into two panels by the Court, consisted of 132 persons, of whom 52 were black. After the division, the strike pool contained 43 members, of whom 2 were black, representing 4.65% of the panel. The 1990 Census figures indicate that the population from which the pool was drawn is 15.07% black.

The panel from which the strikes were made, after challenges, had no blacks.

REASONS FOR ALLOWING WRIT OF CERTIORARI

The record will show that the Petitioner's Appeal to the Eleventh Circuit Court of Appeals was denied on May 25, 1993 and the Suggestion of an En Banc Hearing was overrulled on December 3, 1993.

The two issues presented for review by this Honorable Court are of Constitutional proportions and there is conflict within the circuits as to the issue of the improper jury instruction. The issue of the make-up of the jury is in conflict with the mandate of this Honorable Court in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its prodigy.

SUMMARY OF THE ARGUMENT

This case involving Petitioner originated from a seventy count indictment alleging three criminal violations in what has been referred to as "Medicaid and Medicare Fraud". 18 U.S.C. §287, 18 U.S.C. § 1341. These charges did not involve improper or the lack of treatment or care for patients, or whether or not the patients were actually seen for medical problems, but the charges basically centered around billing for office visits when the patient was seen elsewhere; for example, an intermediate care nursing facility, or billing for a medical procedure billed as one procedure which should have been billed as a different procedure, where there was no monetary difference in the payment.

Due to the nature of these charges, it became important, during the trial, not only where the patients were seen, but also who saw the patients. The Petitioner contended that his Nurse Practitioner, a specialized nurse,

could in fact treat these patients, without Petitioner being in the building, pursuant to collaborating with the Doctor-Petitioner and such could be billed through the Doctor. The Respondent presented specific law which the Trial Court gave its oral charge, over objection of the Petitioner. This oral charge to the jury simply stated that a doctor had to be in the building at the time patients were seen and then review, sign and date all charts unless there existed some other medical emergency at the same time.

Immediately, when able to do so, Petitioner discovered this law was completely erroneous since it was enacted years after any time periods covered in the indictment and a year after the Petitioner was indicted. This erroneous law had a clear prejudicial impact on the Jury's verdicts since; (A) The Jury, during deliberations, asked for a recharge on this specific law; (B) This erroneous law was given as a general proposition of law; (C) It

was given as relating to all counts in the indictment, and (D) It clearly led the Jury to falsely believe Petitioner was violating the law as charged in the indictments since he was not in the building at the precise time when patients were seen or treatment rendered.

Furthermore, even if this law and subsequent jury charge had not been in fact presented erroneously, it was still in error since this charge did not relate to the evidence presented at Trial. While the evidence at Trial did discuss the role of a Nurse Practitioner and the necessary "collaboration" with the Doctor, there was no evidence presented that the Petitioner had to be in the building. In fact, the only source presented on this point of law and fact was the erroneous jury charge provided by Respondent.

The final issue involves another "step forward" in an effort to end racial discriminaton, or the appearance thereof, in

the jury selection process. In selecting the jury, there were absolutely no black members on the venire. The Petitioner is black. Hence, the Petitioner requests this Court to go beyond any inquiry into a "representative cross-section of the community" and/or "systematic exclusion" and establish a new constitutional standard of equality and impartiality in the jury selection process.

ISSUE ONE

The first issue presented for review by the Petitioner is whether the Trial Court erred in giving a totally false and misleading jury instruction as requested by the Respondent.

Immediately prior to the Trial Court's oral charge to the jury, the Respondent requested a specific jury instruction which the Trial Court gave in its oral charge.1 Thereafter, the Petitioner specifically

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1. The charge in question is as follows: "Now, ladies and gentlemen of the Jury, the

objected to this requested jury charge, which had been provided to the Court by the Respondent. After a lengthy deliberation, the jury returned and specifically requested a re-charge only on the three criminal statutes and the jury charge in question. Again, the Trial Court read the erroneous instruction to the Jury.

After the Jury's verdicts, it was then discovered by the Petitioner that the Respondent's requested Jury instruction was erroneous since it became law beginning January 10, 1991, well after the issuance of the indictment and two years after the last time period governing the conduct of the

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rules and regulations of the Medicare and Medicaid Program provide that physician services are defined as services rendered by a licensed medical doctor within the scope of the practice of medicine as defined by State law, by or under the personal supervision of licensed medical doctor. Personal supervision is defined as services provided while the physician is in the building and for which the physician assumes responsibility and signs and

Petitioner. Immediately upon discovery, Petitioner filed a detailed Motion for New Trial which tracked the legislative history of Section 10-C-7 .038 of the Florida Administrative Code, which is what the Trial Court was presented by the Respondent and which was given verbatim by the Court in its' oral charge. (Law cited in footnote one [1]. A complete recitation of the legislative history of this jury instruction is clearly set out in the Petitioner's Motion for New Trial and Brief in support of said motion, and does not need to be restated in light of the admissions of the Respondent that this section, submitted verbatim as a jury instruction, was not legally in effect for purposes of this trial.

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dates the charts on the same date the service is provided.

If the physician's signature cannot be obtained on the date of service due to time constraints, the signature must be obtained within twenty-four hours of the service. Physician's examination is defined as a personal face-to-face contact with a recipient by a licensed medical doctor by another

Despite the contention by the Petitioner that this jury instruction was clearly erroneous as applied to the totality of the law and the facts, the Trial Court denied Petitioner's Motion for New Trial except as to Counts Ten, Eleven and Twelve.

It has been generally held that the Trial Court maintains wide descretion in putting together and delivering its's oral charge to the Jury. United States v. Walker, 720 F.2d 1527, 1541 (11th Cir. 1983), cert. denied 465 U.S. 1108 (1984). However, such discretion involves the Trial Court making sure that the Court's jury charge, taken in its entirety, correctly states the law and facts.

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licensed medical professional under the personal supervision of a physician for the purpose of diagnosis and treatment of medical disorders. The services of non-physicians must be rendered under the phycician's direct supervision.

Direct personal supervision in the office does not mean that the physician must be present in the same room with his aide; however, the physician must be present in the office suite and immediately available to provide assistance and direction throughout the time the aide is performing services. The

United States v. Terry, 911 F.2d 272, 279 (9th Cir. 1990); United States v. Agnew, 931 F.2d 1397, 1410 (10th Cir. 1991); Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1358 (11th Cir. 1990); United States v. Gallup, 812 F.2d 1271, 1279 (10th Cir. 1987); United States v. Little, 753 F.2d 1420, 1432 (9th Cir. 1984); United States v. Messerlian, 832 F.2d 778, 789 (3rd Cir. 1987).

In following this proposition of law, Appellate Courts have constantly held that a conviction will be reversed if:

(A) The legal issues are not presented correctly:

(B) "...the charge improperly guided the Jury in such a substantial way as to violate due process";

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availability of a physician by telephone would not constitute direct personal supervision. If auxiliary personnel perform services outside the office setting, their services likewise are covered as incident to the physician's services only if there is direct personal supervision by the physician.

(C) The jury instruction is not an accurate statement of law;

(D) The jury charge is not "Factually supportable";

(E) The Jury might have been misled by the instruction, and

(F) "...the charge included crimes not contained in the indictment". United States v. Hooshmand, 931 F.2d 725, 733 (11th Cir. 1991); United States v. Terry, 911 F.2d 272, 279 (9th Cir. 1990); United States v. Lard-Velasquez, 919 F.2d 946, 950 (6th Cir. 1990); United States v. Agnew, 931 F.2d 1397, 1410 (10th Cir. 1991); United States v. Turner, 871 F.2d 1574, 1578 (11th Cir. 1989), cert. denied 111 S.Ct. 552 (1990); William v. Armontrout, 871 F.2d 656, 661 (8th Cir. 1989); United States v. Finestone, 816 F.2d 583, 590 (11th Cir. 1987), cert. denied 484 U.S. 948 (1988); United States v. Messerlian, 832 F.2d 778, 789 (3rd Cir. 1987), cert. denied 485 U.S. 988 (1988); United States v. Pruitt, 763

F.2d 1256, 1261 (11th Cir. 1985); cert. denied 474 U.S. 1084 (1986); United States v. Perl, 584 F.2d 1316, 1323 (4th Cir. 1978). It is, or course, the Petitioner's contention that the jury charge, presented by the Respondent and given by the Trial Court, was not only clearly erroneous but also does not correctly reflect the facts and improperly guided and misled the Jury.

The standard used by the Appellate Courts in examining a questioned jury charge appears to focus on whether there exists prejudice to the Petitioner; whether there exists the likelihood of a miscarriage of justice; or whether such instruction renders the trial fundamentally unfair. United States v. Terry, 911 F.2d 272, 279 (9th Cir. 1990); United States v. Agnew, 931 F.2d 1397, 1410 (10th Cir. 1991); United States v. Alvarez-Moreno, 874 F.2d 1402, 1412 (11th Cir. 1989), cert. denied 110 S. Ct. 1484 (1990); United States v. Pepe, 747 F.2d 632, 635 (11th Cir. 1984);

United States v. Graziano, 710 F.2d 691, 697 (11th Cir. 1983), cert. denied 466 U.S. 937 (1984); Pope v. Illinois, 481 U.S. 497, 501, 102 S.Ct. 1918, 1922, 95 L.Ed. 2d 439, 443 (1987). Even the Trial Court here recognized the unfairness and impact this erroneous law had on the jury. Despite the rhetoric used, concerning erroneous jury instructions, courts have further narrowed the issue by simply stating that a conviction whould not stand on an unclear jury instruction or one which misstates the law. United States v. Finestone, 816 F.2d 583, 590 (11th Cir. 1987), cert. denied 484 U.S. 948 (1988); United States v. Washington, 817 F.2d 221, 226 (9th Cir. 1987). As stated even simpler, a conviction should be reversed where the "...Jury might have followed the erroneous instruction"; whether there remains"...uncertainty as to whether the Jury was misled..." or that a possibility exists that the erroneous instruction helped the Jury

decide the verdict. United States v. Varner, 748 F.2d 925, 927 (4th Cir. 1984); Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1359 (11th Cir. 1990); Busby v. City of Orlando, 931 F.2d 764 777 (11th Cir. 1991). Even though we discuss looking at the jury charge as a whole, another rule which fits the facts presented herein holds that if a "...specific instruction is so far removed from the standards set by the law that the Appellate Court is convinced that the jury might have been misled, that portion may be viewed in isolation." United States v. Dyer, 922 F.2d, 105, 107 (2nd Cir. 1990). So, regardless of whether this erroneous charge is viewed in isolation or in its entirety, let us not forget"...that Jurors are reasonable and generally follow the instructions they are given." Yates v. Evatt, 111 S.Ct. 1884, 1893 (1991); Cage v. Louisiana, 111 S.Ct. 328, 329 (1990); Richardson v. Marsh, 481 U.S. 200, 211 (1987). This is exactly what this Jury did

with all counts presented to them.

As an element to preserve this issue for review, it is incumbent on Petitioner to make a proper objection to the erroneous charge. King v. Allstate Insurance Co., 906 F.2d 1537 (11th Cir. 1990); United States v. Phillips, 869 F.2d 1361, 1369 (10th Cir. 1988), cert. denied 109 S.Ct. 2074 (1989); Abatino v. United States, 750 F.2d 1442 (9th Cir. 1985); United States v. Graziano, 710 F.2d 691, 696 (11th Cir.1983), cert. denied 466 U.S. 937 (1984); United States v. Harris, 908 F.2d 728, 737 (11th Cir.1990). A review of the record in this case will clearly reveal that this erroneous law, which was read by the Trial Court verbatim in its' oral charge, was presented to the Trial Court by counsel for the Respondent just before the Court gave this law in its' oral charge. The law presented, was entitled; "Department of Health and Rehabilitative Services, Section 10-C-7.038 (r) (s)". The Trial Court then read the law

verbatim from the information provided by the Respondent. At the specified time, Petitioner made specific objections to his portion of the charge.

Since this law was only presented to the Petitioner a few hours before it was given in the oral jury charge, Petitioner was not afforded any opportunity at that time to verify the legality of the charge. Furthermore, as cited in the Motion for New Trial and accompanying Brief, the page containing the statutory history of this exact law had been omitted from the copy provided the Petitioner and the Trial Court. Unfortunately, due to the time frame involved, reliance as to correctness and legal existence of this law was the burden of the Respondent. This reliance has been previously recognized by Appellate Courts since it has been stated that:

> The parties are responsible for directing the Court to the proper law supporting the jury instructions to be given at

> trial. The District Court must rely upon counsel, especially when the law is that of a State other than that in which the District Court sits, and particularly when that law is unsettled. In this situation, it is imperative that all parties fully inform the Trial Judge as to all authorities touching upon the subject. Gregg v. United States Industries, Inc., 887 F.2d 1462, 1472, Footnote 13 (11th Cir. 1989).

However, Petitioner discovered this major error immediately after trial and filed a Motion For New Trial. It was at the hearing on the Motion For New Trial that the Respondent clearly admitted that this law submitted to the Trial Court only became effective after the conduct complained of in the indictment in this case. Clearly, the oral charge given verbatim from Section 10-C-7.038 (r) (s) is admittedly erroneous. (Law quotation footnote 1).

If the next inquiry should involve an analysis as to whether this erroneous portion of the Trial Court's oral charge was prejudicial; likely to cause a miscarriage of

justice; or might have been followed by the Jury, one only needs to recall that the Jury specifically asked for a recharge on this exact law. Again, the Court read this erroneous law and again, Petitioner objected. Without doubt, the Jury, by its's own actions and inquiry, placed greater emphasis and improtance on this erroneous part of the charge. Such is magnified in a recent decision where it was stated that "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the Jury considered on the issu in question, as revealed in the record." Yates v. Evatt, 111 S.Ct 1884, 1893 (1991). Furthermore, this uncertainty as to whether this Jury was misled in reaching its' verdicts and the fact that proper objections were made, eliminates any contention that the harmless error or plain error rules in any way affect this erroneous instruction issue. Busby v. City of Orlando,

971 F.2d 764, 776 (11th CIr. 1991); United States v. Dyer, 922 F.2d 105, 108 (2nd Cir. 1990); Everett v. Carnival Cruise Lines, 912 F.2d 1355, 1359 (11th Cir. 1990); United States v. Graziano, 710 F.2d 691, 696-697 (11th Cir. 1983), cert. denied 466 U.S. 937 (1984).

Now the Respondent contends that the fact that the Jury was charged with statutory authority that was not in effect at the time of the alleged violations by the Petitioner is not an issue.

At the hearing on the Petitioner's Motion for New Trial, Counsel for Petitioner presented a history of the Florida Administrative Code, Section 10-C-7.038. Said section being presented to the Court by the Respondent, at trial, as the statutory authority for the Court's oral charge to the Jury. The Jury returned after one day of deliberation and requested that the Court again charge on that specific section.

At the hearing on the Motion for New Trial, the counsel for the Respondent stated that the Florida Administrative Code is only rules and regulations interpreting the statutes and in the instant matter the rules are promulgated by the Florida Department of Health and Rehabilitative Services. In the history profferred by the Petitioner the Court was shown that Florida Administrative Code, Section 10-C-7.038 (r) (s) was not effective until January 10, 1991. The Attorney for the Respondent agreed that the Code Section did not become effective until January, 1991, stating that the Section was given to the Court (at Trial) as part of a package supplied to Respondent and that the Florida Administrative Code did not cover the issue [Physician's Personal Supervision] during the period relevant to the indictment. Respondent's counsel stated that the Medicare Manual, Section 2050.Z defined personal supervision and that Section is "basically

similar" to the Florida Administrative Code that was subsequently written and became effective January, 1991. Counsel for the Respondent could offer no explanation to the court for having provided law not in effect as authority for the charge to the Jury.

The Respondent contends that only 3 counts of the 67 Count indictment were conecerned with direct supervision and when the Jury asked for a recharge that counsel for Respondent "had no idea that the Court was going to re-read those regulations". Respondent's Counsel contends that the erroneous law had nothing to do with the other counts.

The bottom line is that erroneous authority was given to the Jury, and it bothers the Court; it bothers the Petitioner; it bothers the prosecutor; and it should bother this Honorable Court enough to vacate the Judgment of the District Court and remand

for a new trial.

It is obvious that the jury did not separate the Counts, based upon the law and the facts, but treated trial as one would treat vegetable soup! They chose to take the erroneous law, which clearly made the conduct of the Petitioner unlawful, and applied that law to all of counts of the indictment.

ISSUE TWO

The Petitioner in this case is black. The venire in this case consisted of 132 members, 52 of whom were black. When the venire was split into two panels, leaving a panel of 43 members only two of whom were black, or 4.65% of the panel. Those two were challenged for cause, leaving no black member of the venire for the striking process. 1990 census figures reveal that the population from which the venire was drawn is 15.07% black. there is therefore a comparative disparity of 99.974 percent lesser chance of being on the jury panel than the percentage of population

figures would suggest. There can be no comparison of the after-challenge panel, having, as it did, zero black members. The Defendant made timely objections to the venire.

The history of jury selection in this country has comprised a prolonged by inexorable trend toward the elimination of racial discrimination. The question arises at two different levels--the composition of venire, and the composition of the petit jury--where the issues are not identical but related.

In 1868 the adoption of the Fourteenth Amendment made blacks "born or naturalized in the United States" "citizens of the United States and of the state wherein they reside", guaranteeing their rights to due process and equal protection of the law.

Twelve years later, the amendment was applied to the jury selection process in

Strauder v. West Virginia, 100 U.S. 303 (1879). There, the Supreme Court held that a statute restricting jury service to white males violated the Fourteenth Amendment:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by the law, an assertion of their inferiority, and a stimulant to that racial prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others.

In 1935, the Court found that the Defendant had established a prima facie case of state discrimination by showing that no black had aever sat on a grand or petit jury, and that potential juror lists included racial designations, despite the statement by jury commissioners that they did not consider race. Norris v. Alabama, 294 U.S. 587, 55 S.Ct. 579, 79 L.Ed. 1074 (1935). A pattern of ambiguous

decisions followed Norris, the Supreme Court addressed these ambiguities in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965).[2] The Court found that the inclusion of blacks in the venire satisfied constitutional requirements. At the challenge stage, blacks were "subject to being challenged without cause." A prosecutor was even permitted to challenge a black venire member solely due to race:

> The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. (Emphasis added).

[2] In Swain v. State, 275 Ala. 508, 156 So.2d 368 (1963), affirmed 380 U.S. 202 (1965), the Alabama Supreme Court affirmed the conviction and death sentence of a black Defendant for the rape of a white girl. Two black venire members were challenged for cause, and the State struck the remaining six. No black had served on a petit jury in Talladega County, Alabama for the past fifteen years.

The systematic and consistent striking of black venire members could rise to the level of a prima facie case of denying blacks the right to serve on juries, but the Defendant faced a tremendous burden in raising such a prima facie case:

> When the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the victim may be, is responsible of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. In these circumstances...it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Swain, supra. (Emphasis added).

Although no black had served on a jury in fifteen years, the Supreme Court found no prima facie case of discrimination because the record did not establish that "the prosecutor

alone" was responsible for the situation.

In 1968, the Supreme Court extended the application of the Sixth Amendment to the states by way of the due process clause of the Fourteenth Amendment, thus allowing a Defendant to asset his right to an impartial jury without relying on an equal protection argument. Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

In 1975), the Court held that the right to an impartial jury selected from a representative cross-section of the community was an essential component of the Sixth Amendment right to a jury trial:

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result--biased in the sense that they reflect a slanted view of the community they are supposed to represent. Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975).[3]

[3] Taylor dealt with the exclusion of women from juries.

Duren v. Missouri, 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579 (1979) sets out s three part test for establishing violation of the fair cross-section requirements of the Sixth Amendments:

> The Defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) That the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in jury selection process.

In United States v. Young, 823 F.2d 1234 (2d Cir. 1987), the court dealt with the problem of "systmatic exclusion of the group," and held that where all parts of the process were done by random selection, no Sixth Amendment violation occurred.

In 1988, the Eleventh Circuit focused on the question of degree of underrepresentation in Berryhill v. Zant, 858 F.2d 633 (11th Cir. 1988).4

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4. In preparing the master jury list to be

The Court held that the Defendant was entitled to a fair cross-section of the community, but not to a perfect cross-section.

> This means, of course, that a given degree of deviation from perfect representation with respect to a particular group has little, if any, meaning apart from the specific context in which it occurs. Thus, a given degree of deviation might be constitutionally permissible in a case where the state took every reasonable step to ensure representation of all distinctive groups, yet constitutionally impermissible in a case where the state neglected to take such steps. (Emphasis added).

The California Court of Appeal considered a case where the use of voter registration lists resulted in an underrepresentation of black and Hispanic venire memebers. In re Rhymes (People), 217 Cal.Rptr. 439, 170 Cal. App.3d 2200 (Cal.App.2 Dist. 1985).5

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4. used for the drawing of jury venires, commissioners amassed a sufficient number of names to meet the requirements of the next two years. They compared the population percentages by gender with the 1970 census and added names until the percentage of women on the list was 39.36, compared to a population figure of 52.78%.

No evidence was presented that the list was tampered with or that the underrepresentation resulted from any intentional acts of the state, nor was it denied that the names were randomly drawn from the list. The court decided the case under the fair cross-section requirements guaranteed equally and independently by the Sixth Amendment and by the California Constitution.

The Court held that systematic exclusion of the group need not be deliberate, affirmative action of the state:

> The term "systematic" means that the underrepresentation is due to some rule or procedure of the selection system...
> In Rabinowitz v. United States, 366 F.2d 34 (5th Cir. 1966), the court consistently lacking, the, without more, it is established that the commissioners have failed in their duty."
> As a consequence, constitutional attack on jury composition may be supported by statistics which demonstrate discriminatory result

5. The thirty member jury pool in Rhymes included only two black prospective jurors, or 6.6% of the pool. Neither black venire member was impaneled.

> rather than discriminatory design. The statistical desparity that the evidence shows in this case raises a presumption fo discrimination. Once that presumption has been established, The government cannot dispel it by a mere showing that it has been evenhanded in the compilation of the source list. It is not a question of whether there was discrimination, overt or latent, in the selection or composition process, but rather, whether the government has an adequate justification--a compelling interest--for the particular process used when that process results in underrepresentation of specific special ethnic groups. "Systematic exclusion" is exclusion that regularly occurs and is inherent in the source from which jurors are drawn." (Emphasis added).

That Petitioner does not agree that the impaneled petit jury must reflect the "fair cross-section," nor that he is entitled to a perfect cross-section on the venire. Rather, Petitioner's position is that he is entitled to a fair cross-section of the community in the jury venire. Where only two black prospective jurors remained on a panel of 43, and both of them were challenged for cause,

the Petitioner was forced to strike for trial from a venire which afforded no opportunity to leave even a single black juror.

The Sixth Amendment to the Constitution of the United States mandates a fair cross-section of the community. It does not require a "random selection method." Non-random selection methods involving highly subjective judgments of the jury commissioners are not incapable of producing a constitutional result. Berryhill v. Zant, supra. But the Petitioner urges that an unconstitutional result cannot be justified by random selection method.

Furthermore, methods that appear statistically random of their face may not be as non-discriminatory as they seem. The results of a statistical study of comparative sampling methods was published in the Journal of Criminal Justice. The study compared simple random sampling with cluster sampling with the probability proportionate to

size(PPS). It found that under simple random sampling, each resident's geographic location and ethnic origin significantly influenced his or her chance of being selected for jury service, and suggested as alternative sampling strategy of cluster selection of jurors, which provides a representative list of goegraphic areas within a jurisdiction.

The study concluded that, "The implementation of the cluster sampling method would be a significant step in reducing the representation bias of jury pools..." H. Fukurai, E. Butler, and R. Krooth, Cross-Sectional Jury Representation or Systematic Jury Representation, 19 Journal of Criminal Justice 31.

The Supreme Court acknowledged in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) that for over a century since Strauder v. West Virginia, supra, "the central concern of the recently ratified Fourteenth Amendment was to put an end to

governmental discrimination on account of race."

"The command of Batson is to eliminate, not merely to minimize, racial discrimination in jury selection." United States v. David, 803 F.2d 1567 (11th Cir. 1986).

"One hundred and fourteen years after the close of the War Between the States and nearly 100 years after Strauder v. West Virginia, racial and other forms of discrimination still remain a fact of life, in the administration of justice, as in our society as a whole." Vasquez v. Hillery, 106 S.Ct. 617 (1986), quoting Rose v. Mitchell, 443 U.S. 545 (1979). But historical analysis reveals that the continuing trend is to eliminate every vestige of discrimination from the jury selection process.

"The very idea of a jury is a body of men composed of peers or equals of the person whose rights it is selected or summoned to determine; that is, of his neighbors,

fellows, associates, persons having the same legal status in society which he holds." Strauder v. West Virginia, supra. As Justice Marshall wrote in Peters v.Kiff, 407 U.S. 493, 92 S.Ct. 2163, 33 L.Ed.2d 83 (1972):

> When any large and indentifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Substantive fairness and equality under the law are, of course, the paramount concerns of the courts. But the law also fails where citizens cannot perceive justice. Like Caesar's wife, the judicial system must remain above even the appearance of impropriety. "A trial jury on which [a person] of the Defendant's race has no chance to sit may not have the substance, and cannot have the

appearance of impartiality, especially when the accused is a Negro and the alleged victim is not." Cassell v. Texas, 339 U.S. 282, 70 S.Ct. 629, 94 L.Ed.839 (1950) (Jackson, J. dissenting).

Racial discrimination in the selection of jurors tarnished the image of our judicial system, undermines the integrity of the judicial process, and contravenes the very idea of a jury--a body truly representative of the community." N. Dillard, The Death Knell of the Insurmountable Burden: Batson v. Kentucky, 31 St. Louis University Law Journal 473, quoting Smith v. Texas, 311 U.S. 128, 61 S.Ct. 164, 85 L.Ed. 84 (1940).

"Systematic exclusion" may be the result of an apparently random process. It is the obligation of the government to take affirmative action to reduce such systematic exclusion. Where random selection methods result in a total absence of fair cross-section results, the Sixth Amendment has

been violated. As such, constitutional requirements of equality, fairness and impartiality demand that the Petitioner be granted a new trial.

The Respondent, in all likelihood, will cast out a disclaimer of there being no pattern to eliminate blacks from the venire. The Petitioner would answer that no pattern is necessary... the numbers speak the issue. The Government has had the burden since 1868 to develop a judicial system which provide fair and equal treatment of all citizens. That burden is heavy and mandatory. Through the years the courts have wrestled with the problem and the landmark cases are cited herein. They do not need to be rehashed. Whatever plan now in effect in the Northern District of Florida does not work! The burden is still on the Government to provide a forum in which any man can expect to see at least some person in the jury venire from his own race. If he doesn't want that person on the

jury, he can strike him off, but this Petitioner did not have that constitutionally mandated luxury! The mandate is in effect, but the system falls short.

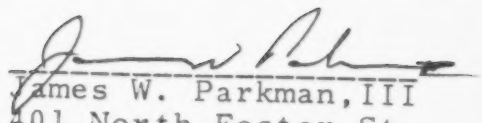
The Respondent cannot hide under the cloak of disclaimer alleging that no pattern of elimination of blacks exists. Counel for the Respondent was there in the courtroom. He has as much duty to ensure a fair trial as the Court or the Respondent. More so, the Petitioner is the watchdog that must sniff out the inequity and howl to the Court for constitutional relief. In this case, the Counsel for the Respondent should have raised his voice in protest also when he saw that the venire was totally lacking in persons of the Petitioner's race, thereby nor allowing even the slightest hint of impropriety in jury selection.

This Petitioner did not write the law, he is just asking that the law be recognized and followed.

The crowing rooster is a fool, for he believes that it is his voice that makes the sun come up. In this case, the Supreme Court of these United States brought sunshine to the jury selection process...your Petitioner only wants to bask in its glow.

CONCLUSION

WHEREFORE, the Petitioner respectfully contends that this court should grant his Petition for Writ of Certiorari and reverse the instant conviction for a new trial not inconsistent with the United States Constitution.



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APPENDIX

Affirmation of the Appeal to the United States Court of Appeals for the Eleventh Circuit.....

Suggestion of Rehearing En Banc denied.....

APPENDIX A

FROM THE

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: 91-4144

UNITED STATES OF AMERICA V. FREDDIE WILLIAMS

Before Judge EDMONDSON and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge

In this appeal from a final judgment of conviction in a criminal case in the United States District Court for the Northern District of Florida, the appellant Freddie J. Williams raises and presents to this Court the following issues:

1. Whether the evidence supports appellant's conviction;

2. Whether appellant, who is black, was constitutionally entitled to be tried by a jury comprised of at least one black individual;

3. Whether the court's failure to examine material alleged by appellant to be producible under the Jencks Act was reversible error; and

4. Whether the jury instructions were erroneous.

The record in this case clearly reflects that there is no merit in any issue presented by the appellant.

We AFFIRM. Dated May 25, 1993.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO: 91-4144

United States of America v. Freddie Williams

Before EDMONDSON and CARNES, Circuit Judges, and JOHNSON, Senior Circuit Judge.

The Petition for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing En Banc are DENIED.

DATED December 3, 1993.